OLC 73-0093

OGC Has Reviewed

6 February 1973

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Protection of Classified Information

1. This memorandum is for your information.

2. As we previously noted, the Director of Central Intelligence has a statutory responsibility for protecting intelligence sources and methods from unauthorized disclosure, but there are no provisions of law designed specifically to enforce this responsibility. We have to look, therefore, to the traditional espionage and related laws.

3. Like the head of any agency, you are also responsible for protecting Agency information which is classified in accordance with the terms of Executive Order 11652, which goes beyond the pure source-and-method problem. Here again the traditional statutes provide the only sanctions.

4. Experience has shown that existing law does not provide a very effective enforcement tool. In the event of prosecution, the two basic statutes require demonstration that the information involved relates to the national defense and security. This is a question for the jury and must be produced in open court. We, thereby, authenticate the very information we are trying to protect. These laws also require either proof of intent or reason to believe that the information will be used to harm the U. S. or aid a foreign power. Again this is a question for the jury and is one in which proof is usually very difficult.

5. There are several provisions for specialized situations. Thus, the Atomic Energy Act makes the revelation of Restricted Data a crime but only if it is done with intent to injure the U. S. or secure an advantage from any foreign nation or with reason to believe that either of these will happen. Again, a statute defines Communications Intelligence as a category, and here all that is needed is to prove that it was knowingly and willfully transmitted to an unauthorized person. These two have never been fully tested in court. There is also a provision known as the Scarbeck statute, named after an individual who was prosecuted thereunder. This makes the knowing revelation of classified information a crime but applies only to Government employees who transmit such classified information to an agent of a foreign power. The opinion in the Scarbeck case provides that the prosecution must only prove that the material was classified. The court further held that whether the material was properly classified was not an issue to be considered by the court. For some years we have been advocating an amendment to the Scarbeck statute which would make it apply to any employee or former employee who gave classified information to an unauthorized person. This, we believe, would be quite an effective tool, but our best judgment has been that this Agency should not get out in front in seeking such authority.

6. A couple of years ago a Commission was set up to study a complete revision of the Federal Criminal Code, and we started to work with it in the areas pertaining to the protection of information. The Commission's work, including some of our suggestions, went to a Department of Justice Task Unit (established by direction of the President), with which we have been working for the past year. Its draft legislation, which was sent to OMB, was an improvement but still fell short of what we felt was needed. On 1 February we sent Mr. Rommel a letter accompanied by our suggested changes to the Department of Justice's draft. The Department of Defense independently made almost the same recommendations. I attach our comments and the sections of law which are under consideration. A new point is contained in section 1126 which provides for injunction to restrain violations. This is similar to the injunction authority in the Atomic Energy Act, but this as you may know has never been properly tested in the courts. However, if this proposed legislation passed in the form we recommend, it would be of very material assistance to the enforcement of the Director's responsibility for protection of information.

7. Separate from this general legislation, we are drafting legislation which would identify a category of "Intelligence Data" somewhat similar to the categories of Communications Intelligence and Restricted Data. Again we are without the guidance of court precedents, but we feel it could be another useful tool. This would be by an amendment to the National Security Act, which would place the bill with the two Armed Services Committees.

8. The general legislation will probably be introduced this spring but may become the subject of protracted debate. Our own provision concerning "Intelligence Data" will have to be discussed with our Subcommittees as it may be preferable to combine it with the general legislation which will be before the Judiciary Committees.

STATINTL

[redacted]

LAWRENCE R. HOUSTON
General Counsel

Attachment

cc: Executive Director
OLC
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